

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Darien Telephone Company, Inc.)	
Logan Telephone Cooperative, Inc. and)	
Roanoke & Botetourt Telephone Company)	CC Docket No. 96-45
)	
Request for Review of the Decision of)	
Universal Service Administrative Company)	
Decision Regarding Safety Net)	
Additive Support)	

REPLY COMMENTS OF
DARIEN TELEPHONE COMPANY, INC., LOGAN TELEPHONE
COOPERATIVE, INC. and ROANOKE & BOTETOURT TELEPHONE COMPANY

Darien Telephone Company, Inc., Logan Telephone Cooperative, Inc. and Roanoke & Botetourt Telephone Company (hereinafter the “Petitioners”) jointly submit these Reply Comments in response to the invitation of the Federal Communications Commission (“FCC” or “Commission”) to comment on Petitioners’ requests for review (“Requests”) of a decision by the Universal Service Administrative Company (“USAC” or “Administrator”) to significantly reduce the Petitioners’ Safety Net Additive (“SNA”) support.¹

At the outset, the Commission should take notice that no commenters opposed the Petitioners’ Requests. On the contrary, those who commented provided further evidence that USAC’s decision to apply the Wireline Competition Bureau’s (“Bureau’s”) interpretation of Section 36.605 of the Commission’s Rules retroactively without any prior notice is contrary to

¹ *Darien Telephone Company, Inc., Logan Telephone Cooperative, Inc., and Roanoke & Botetourt Telephone Company Request Review of the Universal Service Administrative Company’s Decisions Regarding Safety Net Additive Support*, CC Docket No. 96-45, Public Notice, DA 05-1953, rel. July 6, 2005.

the Commission's goals for SNA and violates due process rights. Accordingly, the Commission should immediately overturn USAC's decision and, at the very least, instruct the Administrator to refund the Petitioners' SNA support that was taken from the Petitioners when USAC retroactively applied the Bureau's interpretation.

I. Background

As explained in the Requests, in November 2003, USAC sought guidance from the Bureau regarding whether, under Section 36.605 of the Commission's Rules, "carriers who meet the SNA eligibility criteria in more than one period may be eligible to receive additional support, and if so, how much and over what period of time."² Although USAC did not receive a response from the FCC until January 2005, the administrator disbursed SNA support to the Petitioners based upon a reasonable interpretation of this Rule.³ Upon receiving the January 14, 2005 Letter, USAC learned that its interpretation differed from the Bureau's interpretation. Based upon this finding, USAC, in letters to the Petitioners dated March 2, 2005 ("March 2005 Letters"), declared that it was "required" to recalculate the Petitioners' SNA support on both a retroactive and a prospective basis. The recalculation on a retroactive basis meant that a significant amount of SNA support which had previously been advanced to the Petitioners was

² Requests at 4 citing Letter dated January 14, 2005, from Jeffrey J. Carlisle, Chief of the Commission's Wireline Competition Bureau to Irene Flannery of USAC ("January 14, 2005 Letter"). USAC is subject to FCC oversight and must seek FCC guidance regarding interpretation of unclear provisions of Commission rules. *See Comprehensive Review of Universal Service Fund Management, Administration and Oversight; Federal-State Joint Board on Universal Service, Schools and Libraries Universal Support Mechanism; Rural Health Care Support Mechanism; Lifeline and Link-Up; Changes to the Board of Directors for the National Exchange Carrier Association, Inc.*, WC Docket Nos. 05-195, 02-60, 03-109; CC Docket Nos. 96-45, 02-6, 97-21, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking (rel. June 14, 2005) at para. 10 citing 47 C.F.R. § 54.702(c)-(d).

³ *See* Comments jointly filed by the National Telecommunications Cooperative Association and the Organization for the Promotion and Advancement of Small Telecommunications Companies ("NTCA/OPASTCO") at 3 ("USAC reasonably interpreted the SNA rule when calculating the SNA support for eligible carriers . . .").

required to be paid back immediately in the form of an offset from the amount of support provided to the Petitioners in the National Exchange Carrier Association (“NECA”) settlement process.⁴ Because of the recalculation of the SNA support on a prospective basis, the amount each Petitioner had anticipated receiving and planned to use on a going forward basis to further invest in infrastructure serving its rural communities was significantly reduced.⁵

I. Allowing USAC’s Decision to Stand Would Undermine the Purpose for Which SNA Was Established

The decision by USAC to “take back” SNA support is contrary to the Commission’s goals for establishing the SNA mechanism. As cited in the Requests, SNA support was established “solely to provide rural carriers with ‘appropriate incentives’ and ‘predictability’ to invest in network infrastructure serving their communities.”⁶ As explained in the MAG Order, SNA was established by the Commission with the purpose of providing “additional support to those rural carriers that have made significant investment in years in which the fund is capped.”⁷

⁴ As demonstrated in Attachments 1&2 of the Requests, USAC’s recalculation resulted in a “prior period adjustment” of approximately \$125,000 for one Petitioner, \$133,000 for another. For the third Petitioner, Roanoke & Botetourt Telephone Company (“R&B”), the “prior period adjustment” was \$255,000. The “prior period adjustments” were deducted, in their entirety, from the total balance owed to the Petitioners for their March 2005 settlement.

⁵ As demonstrated in Attachment 1 of the Requests, the recalculation of SNA on a prospective basis meant that for one Petitioner, the amount of monthly support was reduced by approximately \$5300; for another it was reduced by \$5600 and for the third, R&B, the amount of monthly support was reduced by \$10,200.

⁶ Requests at 5 citing *Federal-State Joint Board on Universal Service; Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket Nos. 96-45, 00-256, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256, 16 FCC Rcd 11244 (2001) (“MAG Order”) at paras. 80 & 81. This is further supported in comments filed by John Staurulakis, Inc. (“JSI”), when it states that the Commission’s overall objectives for federal high-cost support since its inception has been the “predictability of these support funds and the proper administration of the support programs.” Comments of JSI at 1.

⁷ MAG Order at para. 80. To be eligible for SNA, companies must realize growth in Telecommunications Plant in Service (“TPIS”) per loop of at least 14 percent more than the study area’s TPIS per loop investment at the end of the prior period, or the “base year.” *Id.* See 47 C.F.R. § 36.605(c)(2).

According to the Commission, SNA is a “reasonable means of ensuring that rural carriers that make significant investments receive adequate but not excessive support for such investments” and of ensuring that “support is tailored to those carriers who make extraordinary investment.”⁸ These goals of “predictability” and ensuring that rural carriers receive adequate support for their investment in rural communities will be thwarted if USAC’s decision is not overturned.

Each of the Petitioners is a small rural carrier that serves low density, high-cost areas. Two of the Petitioners have approximately 7,000 access lines while the other has approximately 10,000 access lines. Based upon USAC’s interpretation of Section 36.605, these companies applied for and received additional SNA support in order to make “significant” and “extraordinary” investments in infrastructure in the rural communities that they serve.⁹ (For example, Logan Telephone Cooperative, Inc. uses SNA support to pay back loans that the company took out in order to build-out a fiber-to-the-node network to one hundred percent of its customer base). They then relied upon receiving this pre-determined level of support for succeeding years for these investments.¹⁰ Not until the Petitioners received the March 2005 Letters from USAC, were they made aware that a significant amount of funding would be taken back and future funds significantly reduced. Obviously, such radical change in funding is in complete contrast to the “predictability” of funding that SNA was designed to provide to these small rural carriers. For example, since 2001, Darien Telephone Company, Inc. has expanded its

⁸ MAG Order at para. 91.

⁹ See Comments of JSI at 3 (“Even under USAC’s own interpretation, the carriers were acting according to the rule when submitting subsequent qualification letters”).

¹⁰ See MAG Order at para. 89 (“Providing support in the years succeeding the qualifying year is consistent with the manner in which carriers depreciate capital costs associated with new investments. Such costs generally are not recovered in one year; rather they are recovered over multiple years. Thus, by providing carriers with support over multiple years, we give them an opportunity to receive support for more of the expenses associated with their investments”).

regulated telephone plant by over \$10 million to enable the company to deliver broadband services to many of its rural subscribers and anticipates continuing to expand its network so that even more subscribers will have access to broadband. Part of the funds used for this build-out comes from SNA support. The significant reduction in SNA support impacts this build-out by causing delays and increases the possibility of cancellation of certain planned projects.

Accordingly, to ensure that Commission goals and objectives in establishing the SNA support mechanism are not frustrated, USAC's decision to recalculate the Petitioners' SNA support on both a retroactive and a prospective basis must be overturned.

II. The Decision to Apply the Bureau's Interpretation Retroactively Lacked the Requisite Due Process Element of Notice

As demonstrated by the commenters, due process and the Administrative Procedure Act ("APA") require fair notice before a government agency can apply a rule on a retroactive basis.¹¹ Prior to the March 2005 Letters, the Petitioners had no notice that USAC had sought guidance from the FCC regarding the interpretation of Section 36.605. Further, the Petitioners were not given notice by the regulation at issue.¹² Accordingly, the Petitioners had no knowledge that the funds were subject to refund. Because no notice was given, USAC's decision to retroactively apply the Bureau's interpretation and require refund of the Petitioners' SNA must be overturned to protect due process rights and ensure compliance with the APA.

¹¹ See *Id.*; Comments of NTCA/OPASTCO at 3, n.8.

¹² See Comments filed by JSI at 2-3 (citing FCC and court precedent that in certain cases the regulation at issue could serve as notice in order to fulfill due process obligations but finding that in this case, "it is clear that the carriers would not have been placed on notice by reading the regulation at issue").

III. Conclusion

All parties filing comments in this proceeding provide strong record evidence demonstrating that the Commission has no alternative but to overturn USAC's decision to recalculate the Petitioners' SNA support on a retroactive basis. Further, as demonstrated in the Requests and these Reply Comments, USAC's decision to recalculate the Petitioners' SNA on a prospective basis should also be overturned to ensure that the goals of "predictability" and ensuring that rural carriers receive adequate support for their investment in rural communities are not frustrated. Accordingly, the Commission should promptly grant the Petitioners' Requests and, at the very least, instruct USAC to immediately refund the SNA support which was deducted from the Petitioners in the NECA settlement process.

August 22, 2005

Respectfully submitted,

Darien Telephone Company, Inc.

/s/ John Zoucks

John Zoucks, General Manager

Logan Telephone Cooperative, Inc

/s/ Greg Hale

Greg Hale, General Manager

Roanoke & Botetourt Telephone Company

/s/ Steve Goodman

Steve Goodman, Director-Regulatory & Business
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CERTIFICATE OF SERVICE

I, Marty Kluh, certify that a copy of the foregoing Reply Comments of Darien Telephone Company, Logan Telephone Cooperative, Inc. and Roanoke & Botetourt Telephone Company in CC Docket No. 96-45, was served on this 22nd day of August 2005 by electronic mail or First-Class Mail (where indicated) to the following persons.

/s/ Marty Kluh

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